

325885

2029 K Street, NW  
Washington, DC 20006  
202.429.5609 Telephone  
202.872.0619 Facsimile  
www.oceanconservancy.org

DEPT. OF TRANSPORTATION  
DOCKETS

2005 APR 19 A 9:04

April 18, 2005

Attn: George Detweiler  
Docket Management Facility  
U.S. Department of Transportation  
400 Seventh Street SW  
Washington, DC 20590-0001



Via facsimile: 202-493-2251

<sup>15</sup>  
**Re: Docket number USCG-2005-20380; Port Access Route Study of Potential Vessel Routing Measures To Reduce Vessel Strikes of North Atlantic Right Whales, 70 Fed. Reg. 8312 (Feb. 18, 2005)**

Dear Mr. Detweiler:

The Ocean Conservancy ("TOC") appreciates this opportunity to provide initial feedback on the Coast Guard's Port Access Route Study for reducing vessels strikes of North Atlantic Right Whales. TOC has long been involved in right whale protection efforts, including serving on the Atlantic Large Whale Take Reduction Team charged with reducing right whale entanglements in fishing gear, and we believe that addressing the threat of ship strikes is essential to the survival and recovery of this critically endangered species. The Coast Guard and the National Marine Fisheries Service ("NMFS") must work together to develop mandatory shipping lanes with appropriate speed restrictions, dynamic management areas, and other measures necessary to satisfy the agencies' duties to protect the species under the Endangered Species Act ("ESA") and Marine Mammal Protection Act ("MMPA").

Pursuant to the Endangered Species Act, the Coast Guard has the duty to use its authority "in furtherance of the purposes" of the ESA and to insure that its own actions and the actions of other entities that its funds or authorizes are not likely to jeopardize the continued existence of the right whale or result in the destruction or adverse modification of right whale critical habitat. See 16 U.S.C. § 1536(a)(1) and (2); see also § 1531(c). The Coast Guard must treat these duties as paramount in undertaking the PARS and in moving forward expeditiously with regulatory measures that result from the findings of the PARS, even if right whale protection may not be the agency's primary purpose. See TVA v. Hill, 437 U.S. 153, 185 (1978) (holding that the ESA requires each federal agency to "give endangered species priority over [its] 'primary mission'"). Congress unquestionably knew of the requirement to "give the species the benefit of the doubt"

*The Ocean Conservancy strives to be  
the world's foremost advocate  
for the oceans. Through research,  
education and science-based advocacy,  
The Ocean Conservancy informs,  
inspires and empowers people to speak  
and act on behalf of the oceans.*

Printed using soy-based ink on recycled paper

when it specifically commanded completion of this PARS for reducing vessel strikes of right whales through Section 626 of the Coast Guard and Maritime Transportation Act of 2004.

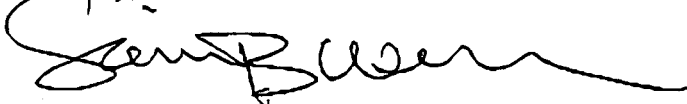
Regarding the specifics of the PARS, the Coast Guard should examine all routing measures put forth by NMFS in its Advance Notice of Proposed Rulemaking, not just Cape Cod Bay and other areas as time allows. As made clear in the ANPR and acknowledged in the PARS notice, right whales inhabit and migrate through coastal and offshore areas all along the East Coast. For this reason, a comprehensive analysis is required. Furthermore, the critically endangered status of the species requires that this type of comprehensive study be undertaken as quickly as possible. The Coast Guard should also consider expanded protection, beyond the times and areas suggested in the ANPR. Specifically, they should consider routing measures to protect whales within the Cape Cod Bay Critical Habitat as well as "off Race Point" from December through May of each year to protect right whales as they enter and leave this vitally important area.

Although we have heard concerns of economic consequences of moving shipping lanes, these concerns should not come into play at this initial scoping phase. Pursuant to 33 U.S.C. § 1223(c), which governs port access routes and the conduct of PARS, no route may be designated without a proposed rulemaking. Thus, we encourage the agency to use the PARS to collect as much information as possible on the co-occurrence of vessels and right whales, with any potential economic consequences to be considered at a later stage. Such an approach would truly give the species the benefit of the doubt and appropriately separate biological and economic considerations.

Finally, in undertaking the PARS and determining what regulatory measures to take based on its findings, the Coast Guard and NMFS must not presume beneficial effects from other agency actions that have not yet been taken. For example, the PARS and any recommendations that come from it should not "credit" the Coast Guard or NMFS with reducing vessel speed. Although speed restrictions have been mentioned in NMFS' Advance Notice of Proposed Rulemaking, and indeed are supported by TOC, such measures have not been put in effect and indeed have not even been released as a Proposed Rule. Because right whales are not receiving the benefit of speed restrictions or other measures that have been discussed extensively over the years but not yet implemented, the Coast Guard should start with a blank slate in examining the full extent of what measures are required to protect the species from extinction.

The Coast Guard and NMFS have both the obligation and the authority under domestic law to protect right whales from ship traffic entering U.S. ports. We encourage the agencies to use the full extent of their authorities for the benefit of the species and work together to find solutions that are sufficiently protective. Please feel free to contact me at (202) 351-0478 if you wish to discuss these recommendations further. We look forward to your prompt action on this matter.

Sincerely,



Sierra B. Weaver  
Staff Attorney